Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1976.

Supreme Court, U. S.
FILED
MAY 21 1976

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

vs.

RICHARD ROE, an infant, by ROBERT ROE, his parent; JOHN DOE, an infant, by MARY DOE, his parent; JAMES MOE, an infant, by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS and DENTISTS,

Intervenor-Appellees.

On Appeal From the United States District Court for the Southern District of New York

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,
S. CLARK MOORE,
Assistant Attorney General,
SHUNJI ASARI,
OWEN LEE KWONG,
Deputy Attorneys General,
800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 620-2808.

Attorneys for State of California, Amicus Curiae on behalf of appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Interest of Amicus Curiae 1

Summary of Argument 3

Argument 5

I

The Statutory Requirement That Prescriptions for Schedule II Drugs Be Issued in Triplicate Serves a Legitimate Function in the States' Efforts to Control Trafficking in Illicit Drugs .. 5

II

The Schedule II Drug Legislation Does Not Unconstitutionally Interfere With the Physician-Patient Relationship 10

Conclusion 21

TABLE OF AUTHORITIES CITED

Cases — Page

Association of American Physicians and Surgeons v. Mathews, 395 F.Supp. 125 (N.D. Ill. E.D. 1975), affirmed ..... U.S. ....., 96 S.Ct. 388 20

Baird v. Bellotti, 393 F.Supp. 847 (D. Mass. 1975) 12

Baird v. Lynch, 390 F.Supp. 740 (W.D. Wisc. 1974) 12

Barsky v. Board of Regents, 347 U.S. 442 (1954) 5, 6

Blake v. State (Delaware), 344 A.2d 260 13

Breard v. Alexandria, 341 U.S. 622 (1951) 20

California v. Byers, 402 U.S. 424 (1971) 19, 20

Doe v. Bolton, 410 U.S. 179 (1973) 11, 12, 15, 16

Doe v. Commonwealth's Attorney, 75-986, decided March 29, 1976, ... U.S. 12

Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975) 12

Doe v. Rose, 499 F.2d 1119 (10th Cir. 1974) 12

Eisenstadt v. Baird, 405 U.S. 438 (1972) 11

Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975) 12

Futrell v. Ahrens (New Mexico), 88 N.M. 284, 540 P.2d 214 13

Graham v. Richardson, 403 U.S. 365 (1971) 19

Griswold v. Connecticut, 381 U.S. 479 (1965) ..10, 11

Hill v. Sand, 403 F.Supp. 1368 (N.D. Ill. E.D. 1975) 13

Hootch v. Alaska State-Operated School System (Alaska), 536 P.2d 793 13

Page

Jaffess v. Secretary, Dept. of Health, Ed. and Welf., 393 F.Supp. 626 (S.D.N.Y. 1975) 13

Katz v. United States, 389 U.S. 347 (1967) 10

Loving v. Virginia, 388 U.S. 1 (1967) 11

McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) 13

McLaughlin v. Florida, 379 U.S. 184 (1964) 19

Merrikan v. Cressman, 364 F.Supp. 913 (E.D. Pa. 1973) 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 10, 11

Mugler v. Kansas, 123 U.S. 623 (1887) 6

NORML v. Guste, Jr., 380 F.Supp. 404 (E.D. La. 1974), affirmed, 511 F.2d 1400 (5th Cir. 1975) 13

Oyama v. California, 332 U.S. 633 (1947) 19

People v. Alexander (Michigan), 56 Mich. App. 400, 223 N.W.2d 750 13

Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975) 12

Ponter v. Ponter (New Jersey), 135 N.J. Super. 50, 342 A.2d 574 12

Population Service International v. Wilson, 398 F. Supp. 321 (S.D.N.Y. 1975) 12

Prince v. Massachusetts, 321 U.S. 158 (1943) 20

Reed v. Reed, 404 U.S. 71 (1971) 19

Robinson v. California, 370 U.S. 660 (1961) 6, 9

Roe v. Arizona Board of Regents (Arizona), 23 Ariz. App. 477, 534 P.2d 285 12

Roe v. Ingraham, 403 F.Supp. 931 (S.D.N.Y. 1975) 7, 8

Page

Roe v. Ingraham, 480 F.2d 102 (2d Cir. 1975) 20
Roe v. Wade, 410 U.S. 113 (1973) 11, 12, 20
Rosenberg v. Martin, 478 F.2d 520 (1973) 13
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 19
Skinner v. Oklahoma, 316 U.S. 535 (1942) 11
Spears v. Circuit Court, Ninth J.D. Warren City, Miss., 517 F.2d 360 (5th Cir. 1975) 13
Stanley v. Georgia, 394 U.S. 557 (1969) 10
State v. Baker (Hawaii), 535 P.2d 1394 13
State v. Jacobus, 348 N.Y.S.2d 907 (1973) 14
State v. Norflett (New Jersey), 67 N.J. 268, 337 A.2d 609 13
Terry v. Ohio, 391 U.S. 1 (1968) 10
Town of Huntington v. N.Y. Abuse, Etc., 373 N.Y.S.2d 728 (1975) 14
United States v. Buck (D.C.), 342 A.2d 48 13
Watson v. Maryland, 218 U.S. 173 (1910) 14
Wolfe v. Schroering, 388 F.Supp. 631 (W.D. Ky. 1974) 20
Wolff v. Singleton, 508 F.2d 1211 (5th Cir. 1974).. 12

Miscellaneous

Executive Order No. 11599, 36 F.R. 11793 6

Statutes

California Evidence Code, Sec. 990 17
California Health & Safety Code, Sec. 3190 14
California Health & Safety Code, Secs. 11000-11651 6

Page

California Health & Safety Code, Sec. 11150 7
California Health & Safety Code, Sec. 11156 8
California Health & Safety Code, Sec. 11165 6
California Health & Safety Code, Sec. 11166.06 7
California Health & Safety Code, Sec. 11166.11 7
California Health & Safety Code, Sec. 11170 8
California Penal Code, Sec. 11160 14
California Statutes of 1939, c. 1097 .....6, 7
California Statutes of 1972, c. 1407, Sec. p. 2987 .. 6
Idaho Code, Secs. 37-2723 6
Illinois Code (S.H.A.), c. 56½, Sec. 1309 6
New York Public Health Law (McKinney's Consol. Laws), c. 45, §3300 .....1, 3, 7
New York Public Health Law (McKinney's Consol. Laws), c. 45, §3331(6) 3
Uniform Controlled Substances Act, 9 Uniform Laws Annotated, Sec. 205 6
Uniform Narcotic Act, 9 Uniform Laws Annotated, p. 523 6
Uniform Narcotic Act, 19 Uniform Laws Annotated, p. 146 6
United States Code, Title 21, Sec. 801 6
United States Code, Title 21, Sec. 812(b)(2) 6
United States Constitution, First Amendment 10
United States Constitution, Fourth Amendment .. 10
United States Constitution, Fifth Amendment 10
United States Constitution, Ninth Amendment 10
United States Constitution, Fourteenth Amendment 10

Textbooks

Page

Comment, Privileged Communications, 71 Yale L.J. 1226, 1252, n. 177 (1961) 17

Dixon, The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?, 64 Mich. L. Rev. 197 (1965-66) 10

Paulsen, Monroe G., Child Abuse Reporting Laws: the Shape of the Legislation, 67 Colum. L. Rev. (1967) 14

When Physican Obliged To Disclose Information Gained Through Doctor-Patient Relation, 32 Mich. L. Rev. 1164 (1933-34) 14

8 Wigmore on Evidence (McNaughton Rev. 1961), Sec. 2380a, pp. 829-30 .....17, 18

8 Wigmore on Evidence (McNaughton Rev. 1961), Sec. 2383, p. 842 18

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

vs.

RICHARD ROE, an infant, by ROBERT ROE, his parent; JOHN DOE, an infant, by MARY DOE, his parent; JAMES MOE, an infant, by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG and THE AMERICAN FEDERATION OF PHYSICIANS and DENTISTS,

Intervenor-Appellees.

On Appeal From the United States District Court for the Southern District of New York

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA

Interest of Amicus Curiae

In this civil rights case a three-judge panel of the United States District Court for the Southern District of New York declared unconstitutional as a violation of the right of privacy the provisions of the New York Public Health Law, McKinney's Consol. Laws, c. 45, §3300 *et seq.*, which require the inclusion of patients' names and addresses on copies of Schedule

II drug prescriptions which are filed with the state and retained for a short period in a confidential, computerized data bank. In overturning the statute the district court characterized as coming within the fundamental constitutional right of privacy the interest of plaintiff patients in maintaining secrecy as to the nature of their physical condition and medical treatment. The court further held that plaintiff physicians and patients possess a right of privacy as to their confidential communications in the physician-patient relationship and that the physician-patient relationship also encompasses the right of physicians to administer treatment and the right of patients to receive treatment.

Notwithstanding the statutory restrictions on access to the data compiled by the state narcotics bureau and the confidential status of the information there maintained, the district court held that so much of the Public Health Law as requires the reporting to state authorities in Albany of the names and addresses of the patients who receive Schedule II drugs violates the right of patients to confidentiality as to their medical condition and treatment. In addition, the court held the fear of patients that information regarding their legal use of Schedule II drugs might possibly be disclosed and then misinterpreted by third parties had in fact caused some patients to refuse treatment using Schedule II drugs, and that their own refusal of such treatment constituted a violation of their rights and the rights of their physicians to the right of privacy embodied in the physician-patient relationship.

In the State of California, prescription reporting requirements similar to those contained in the challenged New York statute have been adopted as part of California's continuing effort to combat the serious problems of drug abuse among its citizenry and illicit drug trafficking within the State. The common interest of California and its sister state of New York in a strong program against drug abuse and a fair regulatory scheme for the legal use of Schedule II drugs brings the State of California before this Honorable Court as *amicus curiae*.

Summary of Argument

The regulation of the use of Schedule II drugs comes well within a State's broad police powers to promote the health and welfare of its citizenry. New York Public Health Law, McKinney's Consol. Laws, c. 45, §3300 *et seq.*, which embodies a triplicate prescription requirement for Schedule II drugs, sets forth a reasonable and fair regulatory scheme for those drugs which have some important medical uses but which also have a high potential for abuse. The State's interest in discouraging and controlling the illicit prescription of Schedule II drugs as well as its interest in preventing patients from securing unlawful quantities of drugs by seeking prescriptions from a number of physicians justifies the reporting requirement of section 3331(6).

The inclusion of a patient's name and address on a prescription is useful to detect persons who go from doctor to doctor for separate prescriptions of Schedule II drugs which in the aggregate constitute an unlawful amount. The inclusion of the patient's identity is also useful for detecting the issuance by unscrupulous physicians of unlawful multiple prescriptions to a single patient. While the new triplicate reporting requirement may not, in its infancy, have resulted in large numbers of criminal prosecutions, the statute is nonetheless effec-

tive as a deterrent against abuse and illegal distribution of Schedule II drugs.

The reporting requirement for Schedule II drugs does not violate the right of privacy of plaintiffs. The court below erroneously held that a fundamental right of privacy protects the right of plaintiff patients to secrecy as to their medical condition or treatment. While the right to privacy is not easily defined, for constitutional purposes the right is limited, except where related to other articulable protected rights, to the most basic aspects of the human condition such as the right to marry a person of any race or the right to an abortion. The right to the secrecy of one's medical treatment simply does not involve a fundamental issue of the human condition. Since the right is not fundamental, a regulatory scheme which marginally infringes on the right need not be supported by a compelling state interest. Moreover, since the New York prescription reporting requirement provides for the confidentiality of the reported information, the interest of patients in secrecy is substantially maintained.

ARGUMENT

I

The Statutory Requirement That Prescriptions for Schedule II Drugs Be Issued in Triplicate Serves a Legitimate Function in the States' Efforts to Control Trafficking in Illicit Drugs

The three-judge panel below declared unconstitutional provisions in the New York Public Health Law which established the regulation that prescriptions of Schedule II drugs be written in triplicate with one copy sent to the State Bureau of Controlled Substances, Licensing and Evaluation (BCSLE). The court held that the specific requirement that patients' names be included in the copies of prescriptions filed with BCSLE served no substantial state purpose and that the requirement violated the patients' right of privacy manifested both in the patients' right to secrecy as to their medical condition or treatment and the rights of doctors and patients in the physician-patient relationship.

The State of California, *amicus curiae* on behalf of appellant herein, submits that New York's Public Health Law, like its California counterpart Uniform Controlled Substances Act, constitutes a vital component of the state's effort to combat drug abuse and that the public interest served by these statutes far outweighs any interest of plaintiffs to be free from its regulatory scheme.

It is an established principle that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of its citizens. This authority is a vital part of a state's police power. *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). Included in the police power is the right of the state to regulate the administration of drugs and to over-

see all professions concerned with health. *Robinson v. California,* 370 U.S. 660, 664 (1961); *Barsky v. Board of Regents, supra; Mugler v. Kansas,* 123 U.S. 623, 661 (1887).

In 1972, California[1] adopted in substance the Uniform Controlled Substance Act. Cal. Stats. 1972, c. 1407, p. 2987, §2; Cal. Health & Saf. Code §§11000-11651. This act was designed by the National Conference of Commissioners on Uniform State Laws to supplant the Uniform Narcotic Act (see 19 U.L.A. at p. 146) and to achieve uniformity among the laws of the states and the federal government. 21 U.S.C. §801 *et seq.*

Included in this act are special provisions for the prescribing of Schedule II drugs which are those drugs having accepted medical uses but also a high potential for abuse, which abuse may lead to severe psychic or physical dependence. Cal. Health & Saf. Code §11165; Uniform Controlled Substances Act, 9 U.L.A. §205; 21 U.S.C. §812(b)(2).

The basic general objective of the controlled substances laws is to provide a regulatory system which will permit the legal use of controlled substances and which will at the same time prevent and punish illegal use. Uniform Narcotic Act, 9 U.L.A. p. 523 (Prefatory Note). Because Schedule II drugs have a high potential for abuse, such drugs are subjected to special triplicate reporting requirements. 21 U.S.C. §801; Exec. Order No. 11599, 36 F.R. 11793.

The triplicate reporting requirements are not of recent origin in either California law (Cal. Stats. 1939,

[1]Along with California and New York, Idaho and Illinois have similar provisions. Idaho Code §37-2723 *et seq.;* (Ill.) S.H.A., c. 56½, §1309 *et seq.*

1097, former Cal. Health & Saf. Code §§11166.06, 11166.11) or in New York law (McKinney's Consol. Law, c. 45, §3300 *et seq.*)

The name and quantity of the controlled substance, the direction for use, the name and address of the prescriber and the federal controlled substances registration number have long been required to be on the triplicate prescription blank. *See* Cal. Health & Saf. Code §11150. Plaintiffs in this case concede that the states have a substantial and legitimate interest in keeping records of the above information for the purpose of preventing the diversion of Schedule II drugs to illegal use. The maintenance of such records by the states is conceded to be within the police power.

Plaintiffs contend, and the three-judge panel below found, however, that the required reporting of patients' names and addresses did not have a legitimate purpose. There is a suggestion by the three-judge court, moreover, that the name of the patient could be deleted from the forms without any loss in effectiveness of the program. *Roe v. Ingraham,* 403 F.Supp. 931, 937 (S.D.N.Y. 1975).

The court held that the sole purpose served by the inclusion of patients' names was to discover incidents of patients going from doctor to doctor in order to secure an oversupply of drugs. In so holding, the court noted that only one incident of unlawful physician shopping had been uncovered during the short life of the statute.[2]

[2]The California State Triplicate System processed 567,505 prescriptions in 1974, and 593,236 prescriptions in 1975. From

(This footnote is continued on next page)

Amicus submits that the court's holdings below are drastically in error. It is true that the primary purpose for the inclusion of patients' names on the triplicate prescription form is to identify the patient who, without using an alias, goes from doctor to doctor to obtain Schedule II narcotic drugs. *See Roe v. Ingraham, supra.* This, however, is not the only purpose of requiring patients' names. For example, a patient without using an alias could go from doctor to doctor to obtain Schedule II drugs. If the patient's name was not required to be written, a physician could write Schedule II prescriptions using several blanks for the same patient for a total amount in excess of generally accepted usage. Detection of such activity would be very difficult. Also, the physician might be less concerned with the status of his patient and perhaps be motivated by monetary gain if his prescribing habits were scrutinized only for proper dosage, dosage schedule and amount. *See* Cal. Health & Saf. Code §11156 (prohibition of prescribing controlled substances to an addict or habitual user). The physician could prescribe Schedule II drugs for himself by using fictitious names and the violation would remain undetected. *See* Cal. Health & Saf. Code §11170 (no person shall prescribe a controlled substance for himself). If the patient's name is not required, the greatest danger would occur when the pharmacist and the physician conspire to issue and fill Schedule II prescriptions using fictitious names thereby divert Schedule II drugs from legal channels to the more profitable illicit market.

---

these were generated 140 investigations in 1974, and 176 investigations in 1975. These figures indicate quite clearly the efficacy of the system, not only in early detection of violations, but also as a strong control in preventing the diversion of licit drugs to illegitimate channels.

These are but a few examples illustrative of the important part that the inclusion of patients' names in prescription forms plays in regulating the prescription of Schedule II drugs.

Amicus submits, moreover, that the three-judge panel below placed undue emphasis on the fact that only one incident of physician shopping was uncovered in New York between the enactment of the statute in question in 1972 and the time of the trial below. In fact, a primary purpose of the statute was to ensure that doctors would exercise care in prescribing Schedule II drugs and to discourage both the excessive prescribing of such drugs by doctors and unlawful shopping for physicians by patients. The fact that few prosecutions are brought under the statute may very well be a reflection of its effectiveness as a deterrent.

There can be no question that the inclusion of patients' names in the triplicate prescription forms for Schedule II drugs has at least the potential for deterring the unlawful dispensation and consumption of dangerous drugs. Given the severity of the drug abuse problem in the United States and further given the vital interest of the states in combatting the problem and in promoting the health of their citizens under the police power, the range of valid choices which the states may make in this area must necessarily be very broad. The wisdom of any particular choice within the allowable spectrum was not properly a question for the three-judge panel below. *See Robinson v. California,* 370 U.S. 660, 666 (1961).

II

The Schedule II Drug Legislation Does Not Unconstitutionally Interfere With the Physician-Patient Relationship

Plaintiffs claim that the Schedule II drug legislation unconstitutionally interferes with their right of privacy as embodied in the physician-patient relationship. *Amicus* respectfully submits that the physician-patient relationship is not by itself within the zone of privacy that is accorded constitutional protection.

The right of privacy is an amorphous right and is not found in any specific guarantee of the Constitution. It has been recognized in some cases to be implicit in the specific amendments to the Constitution: *i.e.*, the First Amendment, *Stanley v. Georgia*, 394 U.S. 557 (1969); the Fourth and Fifth Amendments, *Terry v. Ohio*, 391 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J. concurring). In other cases it has been recognized as being within the penumbra of the Bill of Rights (*Griswold, supra; see* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 Mich. L. Rev. 197 (1965-66)), or in the concept of personal liberty guaranteed by the Fourteenth Amendments. *E.g., Meyer v. Nebraska*, 262 U.S. 390 (1923).

Except in cases where the right of privacy stems from a specific amendment to the Constitution, the right has been found to exist only in those circumstances where a substantial claim was made of infringement on an individual's freedom of choice with respect to certain basic matters as procreation, marriage, and

family life. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972) (the right of a single person to obtain contraceptives); *Griswold v. Connecticut, supra* (the right of married couples to use contraceptives); *Loving v. Virginia*, 388 U.S. 1 (1967) (the right of persons of different racial classifications to marry); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right of a "habitual criminal" to have offspring); *Meyer v. Nebraska, supra* (the right of an individual to acquire useful knowledge); *Doe v. Bolton*, 410 U.S. 179 (1973) and *Roe v. Wade*, 410 U.S. 113 (1973) (the right to an abortion).

Plaintiffs claim and the district court agrees that the instant case falls within the purview of *Doe v. Bolton* and *Roe v. Wade* because those cases also involved the physician-patient privilege. *Amicus* submits that reliance on the abortion cases is misplaced. The fundamental question in both abortion cases was the right of a woman to decide on whether to terminate her pregnancy. In *Roe* this Court reasoned:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of

unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation."

Roe v. Wade, supra, 410 U.S. at 153.

Plaintiffs' claim of denial of privacy is far afield from the privacy interest protected in the area of marital relations and abortion.[3] Their claim is based not upon any challenge to the state's power to restrict their freedom of action in a sphere contended to be

---

[3]With few exceptions, the right of privacy under *Roe* and *Doe* has been restricted to areas of marital privacy and family life. *See Poe v. Gerstein,* 517 F.2d 787 (5th Cir. 1975) (fundamental right to an abortion applies to minors; parental and spousal consent requirements are unconstitutional); *Doe v. Poelker,* 515 F.2d 541 (8th Cir. 1975) (city policy prohibiting all nontherapeutic abortions in its publicly owned hospitals is unconstitutional); *Wolff v. Singleton,* 508 F.2d 1211 (5th Cir. 1974); *Doe v. Rose,* 499 F.2d 1119 (10th Cir. 1974) (welfare payment restrictions for abortions of indigent mothers are unconstitutional); *Population Service International v. Wilson,* 398 F.Supp. 321 (S.D.N.Y. 1975) (minor may purchase nonprescription contraceptives); *Baird v. Bellotti,* 393 F.Supp. 847 (D. Mass. 1975) (minor may have abortion performed without consent of parents); *Baird v. Lynch,* 390 F.Supp. 740 (W.D. Wisc. 1974) (statute prohibiting sale of contraceptive devices to unmarried persons is unconstitutional); *Merrikan v. Cressman,* 364 F.Supp. 913 (E.D. Pa. 1973) (parent and child); *Roe v. Arizona Board of Regents (Arizona),* 23 Ariz. App. 477, 534 P.2d 285 (statute which provided that no abortions should be performed in a public hospital is unconstitutional); *Ponter v. Ponter (New Jersey),* 135 N.J. Super 50, 342 A.2d 574 (married woman has constitutional right to obtain a sterilization without the consent of her husband).

By contrast, numerous attempts to expand the right of privacy to other areas under the authority of *Roe* and *Doe* have consistently been rejected: *Doe v. Commonwealth's Attorney,* 75-986 decided March 29, 1976, ... U.S. .... (upholding constitutionality of law punishing voluntary homosexual acts committed by adults in their own homes); *Fitzgerald v. Porter Memorial Hospital,* 523 F.2d 716 (7th Cir. 1975) (right of marital privacy does not include the right of either spouse to have the husband present in the delivery room and the prohibition did not

private but instead on a claim that the required reporting of Schedule II prescriptions may subject them to possible injury to their personal sensibilities if the information were publicly revealed.

Plaintiffs' concern for the patients' personal and psychological sensibilities is clearly unjustified, and their concern that they will be stigmatized as narcotic and dangerous drug addicts because the state will have a file on them is unwarranted. In this society, where there is prevalent use of prescription drugs, a Schedule II drug user would hardly be considered a social outcast.

---

unconstitutionally restrict the rights of physicians to practice medicine); *Spears v. Circuit Court, Ninth J.D. Warren City, Miss.,* 517 F.2d 360 (5th Cir. 1975) (state proscription of any abortion by a nonphysician is valid); *McCrary v. Runyon,* 515 F.2d 1082 (4th Cir. 1975) (a private school which holds itself out to the public has no right of privacy); *Rosenberg v. Martin,* 478 F.2d 520 (1973) (the interest in privacy of a fugitive must yield to the public interest in his apprehension); *Hill v. Sand,* 403 F.Supp. 1368 (N.D. Ill. E.D. 1975) (employee does not have right to receive personal mail at his place of employment); *Jaffess v. Secretary, Dept, of Health, Ed. and Welf.,* 393 F.Supp. 626 (S.D.N.Y. 1975) (disabled veteran who was receiving social security disability benefits as well as veteran's disability pension was not deprived of right to privacy by reason of computer comparison to locate persons who had failed to report their social security benefits); *NORML v. Guste, Jr.,* 380 F.Supp. 404 (E.D. La. 1974), *affirmed,* 511 F.2d 1400 (5th Cir. 1975) (possession of marijuana in own home is prohibited); *Blake v. State (Delaware),* 344 A.2d 260 (prostitution); *United States v. Buck (D.C.),* 342 A.2d 48 (sodomy); *State v. Baker (Hawaii),* 535 P.2d 1394 (possession of marijuana); *People v. Alexander (Michigan),* 56 Mich. App 400, 223 N.W.2d 750 (possession of marijuana); *State v. Norflett (New Jersey),* 67 N.J. 268, 337 A.2d 609 (abortion performed by a layman), *Futrell v. Ahrens* (New Mexico), 88 N.M. 284, 540 P.2d 214 (no visitation rule in dormitory); note, *Hootch v. Alaska State-Operated School System (Alaska),* 536 P.2d 793, 813, n. 19 (cultural integrity is not part of right of privacy).

Significantly, the obtainment of drugs by prescription socially legitimates its use. Moreover, the disclosure of the one ailment that may surely affect one's sensibilities, venereal disease, has always been subject to statutory reporting requirements. Cal. Health & Saf. Code §3190; *Note,* Cal. Pen. Code §11160 (reporting of injuries by deadly weapon or criminal act); Paulsen, Monroe G., *Child Abuse Reporting Laws: the Shape of the Legislation,* 67 Colum. L. Rev. (1967); *When Physician Obliged To Disclose Information Gained Through Doctor-Patient Relation,* 32 Mich. L. Rev. 1164 (1933-34); *State v. Jacobus,* 348 N.Y.S.2d 907 (1973) (reporting of certificate of fetal death, the names and addresses of parents of aborted fetuses not an invasion of privacy on women's decision to have abortion); *Town of Huntington v. N.Y. Abuse, Etc.,* 373 N.Y.S. 2d 728 (1975) (reporting requirements of participants of drug abuse program permissible). And, although these reporting requirements have not been subject to federal constitutional challenge, past precedent guides one to the conclusion that they are not violative of the Constitution. *E.g., Watson v. Maryland,* 218 U.S. 173, 179 (1910). Furthermore, in light of the limited access to and stringent control over this information, plaintiffs' fears of disclosure appear to be unreasonable.[4]

[4]The following procedures adopted in California for the use of triplicate prescription data demonstrate the high degree of security and confidentiality accorded this information.

At the end of each month copies of all official triplicate prescriptions that were filed in the month are forwarded to the Department of Justice (DOJ) in Sacramento by the pharmacies in which they were filled. These copies are transferred to IBM key punch cards by key punch operators in the department's data center. The prescriptions are then filed under an arbitrarily assigned batch number. They are retained for a period of one year from the date of issuance and are then destroyed by burning in the same fashion as confiscated drugs. During the retention period they are stored in manual metal file cabinets in the DOJ Sacramento Division of Law Enforcement Building under the same safeguards as the department's criminal record files. The building is a controlled access facility, with 24-hour guards. All personnel are admitted to their work areas by coded identification badges which include their photographs. All visitors are identified and issued badges after which they are escorted to that portion of the building which is their destination. No access is permitted to the prescription file facility.

The completed key punch cards are also stored in the same facility until the end of the month in which they are processed. They are then transported by assigned personnel to the data center computer section where they are transferred to magnetic tape. Ultimately they are destroyed by a recycling process.

The newly created tape is then run by the data center in accord with an established program to create three separate printed tabulator listings, one by prescription number, one by the doctor's federal registry number and one by the patient's last name, first initial and city of residence. These listings also indicate the prescription date, the drug type, form, dosage and quantity, as well as the previously mentioned prescription batch number. At no time does this information reside in an on-line memory. The tapes are retained under the same security as the other data center tapes for a period of 13 months.

Copies of the printed tabulators are kept at the Sacramento ILE facility and at the six area offices of the Bureau of Investigation and Narcotic Enforcement under the same security as all other confidential investigational records maintained at those offices. Their return period is one year. They are destroyed by burning.

Investigational access to the data contained in these printouts is limited by policy to state agents and, on an individual case basis, to assigned personnel of such federal and California law enforcement agencies who are working with the state agents on investigations of violations of state or federal drug laws.

Plaintiff physicians claim that their right of privacy encompasses the right of physicians to practice medicine. Their claim is based in large part on this Court's holding in *Doe v. Bolton,* 410 U.S. 179 (1973).

In *Doe*, a state criminal abortion statute requiring that two licensed physicians concur in the judgment of a pregnant woman's doctor that an abortion should be performed was held unconstitutional because the required acquiescence by co-practitioners has no rational connection with a patient's needs. It is true that this Court also noted in *Doe* that the requirement of acquiescence by co-practitioners unduly infringes on the physician's right to practice. *Doe v. Bolton, supra,* 410 U.S. at 199.

Amicus submits, however, that the right of physicians to practice medicine was not an independent ground for holding the abortion laws unconstitutional. The physician, of course, plays a vital role in the determination of whether or not a woman will terminate pregnancy. His right to practice medicine, however, rises to the level of a right of privacy only insofar as the right of the patient is affected. Unless plaintiff patients can make a showing of a violation of their right of privacy, plaintiff physicians have no independent standing to challenge the triplicate prescription requirement on the basis of the physician-patient relationship. Since plaintiff patients are not deprived of any constitutional right to treatment (see Argument, *supra*), their physicians have no independent constitutional right to administer treatment.

Plaintiffs' final claim that the prescription reporting requirement infringes upon the physician-patient privilege fails to raise a constitutional question. The evidentiary physician-patient privilege is a creature of statute and does not arise out of the Constitution. Furthermore, while it may be said that a few patients have refused to follow the advice of their doctors because of fear of public disclosure of prescribed medi-

cation, there is no evidence that free communication between patient and physician, the real object of the physician-patient privilege, has been in any way hampered by the reporting requirement of the challenged statutes.

To begin with, the relationship between a physician and his patient is not sacrosanct. In the context of rules of evidence, the physician-patient privilege is permeated with exceptions and is subject to waiver. Cal. Evid. Code §§990 *et seq.* In many jurisdictions it does not exist. Comment, *Privileged Communications,* 71 Yale L.J. 1226, 1252, n. 177 (1961). Its existence has, in fact, been criticized. Wigmore complained:

> "In only a few instances, out of the thousand daily occurring, is the fact communicated to a physician confidential in any real sense. Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of medicine in which the patient himself attempts to preserve any real secrecy. [Footnote omitted.] Most of one's ailments are immediately disclosed and discussed. The few that are not openly visible are at least explained to intimates. No statistical reckoning is needed to prove this. These facts are well enough known." 8 Wigmore on Evidence (McNaughton Rev. 1961), §2380a, p. 829.

The complained of disclosure does not inhibit communication between the physician and the patient. Wigmore noted:

> "Even where the disclosure to the physician is actually confidential, it would nonetheless be made though no privilege existed. People would not be deterred from seeking medical help because

of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came? Is it noted in medical chronicles that, after the privilege was established in New York, the floodgates of patronage were let open upon the medical profession, and long-concealed ailments were then for the first time brought forth to receive the blessings of cure? And how is it today in those jurisdictions where no privilege exists—does the medical profession in two thirds of the Union enjoy, in a marked way, an afflux of confidence contrasting with the scanty revelations vouchsafed in that other third where no privilege protects? If no difference appears, then this reason for the privilege is weakened; for it is undoubted that the rule of privilege is intended [citation omitted] not to subserve the party's wish for secrecy as an end in itself but merely to provide secrecy as a means of preserving the relation in question whenever without the guarantee of secrecy the party would probably abstain from fulfilling the requirements of the relation."

8 Wigmore on Evidence (McNaughton Rev. 1961), §2380a, pp. 829-30.

In fact, the information appearing on the prescription is not protected by this privilege because it is not communication but the benefit or result of communication but the benefit or result of communication. *Id.*, §2383, p. 842.

In light of the foregoing, *amicus* submits that the physician-patient relationship claimed by plaintiffs is not within the constitutionally protected zone of privacy.

Laws which neither injure a "suspect class" nor impair a "fundamental interest" are evaluated under the general standard. Under this test, the law is valid so long as it rationally furthers a legitimate state interest. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 16-17 (1973). The regulation and prevention of drug abuse through the Schedule II reporting requirements unquestionably furthers a legitimate state interest. *See* Argument I, *supra.*

However, assuming that the Schedule II filing requirements impinge on a person's fundamental right of privacy, such requirements are not unconstitutional where it can be shown that the state's interests are compelling and that its regulations operate within constitutionally permitted parameters.

A strict standard of judicial review is invoked only when a state law operates to the disadvantage of a "suspect class"[5] or when the state law impairs a "fundamental interest"; when such a law is challenged, it will be upheld if the state can show it is necessary to promote a compelling state interest. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 16-17 (1973).

Where conflict arises between assertions of rights, there must be a balancing of the public interest and the individual right. In *California v. Byers* 402 U.S.

---

[5]There are relatively few classifications which have been held to be suspect and among them are race, *McLaughlin v. Florida,* 379 U.S. 184 (1964); alienage, *Graham v. Richardson,* 403 U.S. 365 (1971); ancestry, *Oyama v. California,* 332 U.S. 633 (1947); and perhaps sex, *Reed v. Reed,* 404 U.S. 71 (1971).

424 (1971), a claim of self-incrimination was held insufficient to override the state's need for disclosures of names and addresses at the scene of car accidents. In *Breard v. Alexandria*, 341 U.S. 622 (1951), the constitutional protection of property rights yielded to a city's interest in protecting its citizens from annoyances. In *Prince v. Massachusetts*, 321 U.S. 158 (1943), the court upheld the state's right to prohibit distribution of literature by a minor against a claim of parental right and religious rights. Indeed, even freedom of speech is subject to reasonable regulation as to time, manner and place. By way of recent example, *Roe v. Wade, supra*, 410 U.S. at 155, 162-64, stated that there are circumstances under which abortions may be regulated. *See Roe v. Ingraham*, 480 F.2d 102, 108 (2d Cir. 1975); *Wolfe v. Schroering*, 388 F.Supp. 631, 639 (W.D. Ky. 1974).

Amicus respectfully submits that the challenged provisions achieve a proper balance of the plaintiffs' right of privacy with the government's interest in health regulation.[6]

---

[6]*Amicus'* position finds support in the recent decision of *Association of American Physicians and Surgeons v. Mathews*, 395 F.Supp. 125 (N.D. Ill. E.D. 1975), affirmed, ... U.S. ...., 96 S.Ct. 388. In this case, plaintiffs brought an action to enjoin the Secretary of Health, Education and Welfare from implementing the professional standards review law and to have such law declared unconstitutional. After first holding that the statute does not bar a physician from practicing his profession but only provides standards for the dispensation of federal funds, the court held that these provisions do not infringe on the constitutionally protected right of privacy of plaintiffs.

Conclusion

For the foregoing reasons, *amicus curiae*, State of California, submits that the judgment of the district court should be reversed.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California,

JACK R. WINKLER,
Chief Assistant Attorney General—Criminal Division,

S. CLARK MOORE,
Assistant Attorney General,

SHUNJI ASARI,
OWEN LEE KWONG,
Deputy Attorneys General,

Attorneys for State of California, Amicus Curiae on behalf of appellant.